



Report to the Auburn City Council

Action Item	8
Agenda Item No.	

City Manager's Approval

To: Honorable Mayor and City Council Members
From: Michael G. Colantuono, City Attorney
Michael R. Cobden, Assistant City Attorney
Date: July 11, 2011
Subject: Sections 303 – 305 of the Proposed Home Rule for Auburn Charter of 2012

The Issue

Should the City Council propose a charter to the voters of the City and include in that proposal Sections 303 – 305 of the draft charter prepared by Councilmember Hanley to address the subjects of prevailing wages on City public works construction projects, local preferences in contracting, and supporting the use of volunteers on community projects?

Conclusions and Recommendations

These are matters of policy and this report is intended only to facilitate Council discussion rather than to make a recommendation.

Discussion

Attached to Mr. Hanley's staff report for the June 13, 2011 City Council meeting was a draft charter, prepared by Mr. Hanley in light of other recently approved charters in cities such as El Centro (2009), Palmdale (2009) and Vista (2007). That draft charter has three provisions affecting public works projects, as follows:

Section 303. Prevailing Wage

No City contract shall require payment of the prevailing wage schedule unless: the prevailing wage is legally required, and constitutionally permitted to be imposed, by federal or state grants pursuant to federal or state law; or the project is [not]¹ considered to be a municipal affair of the City; or payment of the prevailing

¹ Although the word "not" does not appear in the draft charter attached to Mr. Hanley's June 13, 2011 staff report, it seems logically required to accomplish the purpose of Section 303 to exempt City projects from prevailing wages whenever state law permits – i.e., when projects are "municipal affairs" rather than "matters of statewide concern."

wage is authorized by resolution of the City Council. Payment of the prevailing wage schedule, if authorized hereunder, shall use the pertinent rates published by the State of California.

Section 304 Bid Preferences for Placer-County-Based Firms.

The City may, by ordinance, establish bid preferences for firms that are based in Placer County to the extent permitted by state and federal law. The City shall establish all standards, procedures, rules or regulations to regulate all other aspects of public contracting.

Section 305. Supporting Volunteers in Auburn

The City seeks to support volunteers in creating a higher quality of life for Auburn residents and as such declares itself exempt from any state laws or regulations that would make it more difficult or expensive for volunteers to participate in any community project, whether funded with city revenues or not.

Prevailing wages. As the Council has discussed, state law generally requires the payment of prevailing wages on public works construction projects valued at \$1,000 or more if those projects are constructed on behalf of a general law city (*i.e.*, a city like Auburn at present, which does not operate under a voter-approved charter). Labor Code § 1771. This means the contractor awarded the project must pay its workers at least the wage for each job classification established by the state Department of Industrial Relations for the region in which the project is located. These wages reflect labor contracts negotiated by contractors with their employees and are influenced by the relatively higher wages paid to unionized workforces.

Charter cities, however, can establish their own public works construction rules and can eliminate the prevailing wage requirement for some public works projects. *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348. The vitality of this rule is at issue in a case now pending in the California Supreme Court: *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, California Supreme Court Case No. S173586. The case was fully briefed in February 2010 and, in September 2010, the Court issued an order limiting oral argument in the case to the question of concern here. However, the case has not yet been set for oral argument and there is no way of knowing when it will be heard.

Even if the Auburn charter were adopted to include Article 303, even charter cities are subject to prevailing wages when they spend state or federal funds. In addition, one case found Los Angeles obligated to pay prevailing wages when it improved a state highway in that city. *Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115. Prevailing wage proponents read that case broadly to require prevailing wages on projects of regional impact, but narrower readings are possible especially given that the project in issue there was partly funded with state funds. In any event, there seems little dispute that, unless the *Vista* case changes the law, an Auburn charter could empower the City to removal prevailing wage requirements from many, if not most, locally funded public works projects.

When and whether to exempt City construction projects from prevailing wages is, of course a policy question for the Council and the voters who may consider adopting a charter. It is notable that Section 303 as written would allow payment of prevailing wages whenever the City Council determines it is appropriate to do so.

Local Preferences in Contracting. The proposed section 304 would allow the City Council to establish by ordinance bid preferences for Placer County firms in all kinds of contracting – public works, professional services, procurement of goods and supplies, etc. There is some controversy among public lawyers regarding local preferences because they raise questions under the privileges and immunities clause of the 14th Amendment to the U.S. Constitution which states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. Constitution, Amendment XIV, § 1. That clause has been interpreted to require substantial justification before state and local governments distinguish between the rights of their own residents and property owners and those of outsiders. California’s Constitution has been interpreted to impose similar protections as to inter-city economic activity.

Notwithstanding this dispute, many cities and counties have established local preferences to allow local bidders a leg-up in competition for city and county contracts. There is little controversy regarding a rebate of the 1% sales tax paid to the City by a contractor located within its boundaries – that merely makes the City’s economic position neutral as between competing vendors. More generous preferences, such as a 5% bidding advantage for locals, and those which benefit near-neighbors, but not residents or property owners, are more controversial.

As drafted, Section 304 authorizes the Council to establish bid preferences for “firms that are based in Placer County.” Federal law will require such a preference to be justified by local policy interests that do not amount to a mere desire to disadvantage outsiders and the scope of the preference must relate to the nature of those interests. Given the hourglass shape of Placer County and Auburn’s location in the narrowest part of the County, some might question whether a Placer County preference for firms in Lake Tahoe or Roseville at the expense of firms located in Southern Nevada County or Cool is good public policy.

Whether to include Section 304 in the charter and how to establish a preference should that charter be adopted are policy questions. However, we recommend that the City articulate a policy rationale that does not amount to a mere desire to disadvantage outsiders and that relates to the scope of the preference granted. Such a rationale might be a desire to reduce vehicle miles travelled and associated energy use and greenhouse gases, but that rationale would argue for a preference for those located within a stated radius of the City rather than relying on Placer County’s boundaries.

Because Section 304 limits any preference “to the extent permitted by state and federal law,” these issues need not be resolved before a charter is proposed and adopted, but can wait until the Council uses the authority Section 304 would confer.

Support for Volunteers. Section 305 seeks to exempt the City from state “laws or regulations that would make it more difficult or expensive for volunteers to participate in any community project.” The City can do so to the extent the projects involved constitute “municipal affairs” rather than “matters of statewide concern” as that distinction is detailed in the June 22, 2010 staff report from Mr. Colantuono and Mr. Richardson. To date, the legal disputes on this question have involved payment of prevailing wages and, therefore, the analysis of that issue above applies here as well. In addition, the City is more likely to succeed in asserting a home rule claim on this issue to the extent it seeks to exempt its own projects from state regulation rather than seeking to protect projects unaffiliated with the City.

Again, whether to include this provision in a proposed charter and to present a charter to the voters are policy matters for the Council to determine.

Conclusion

This staff report is intended to facilitate Council discussion of these provisions of the draft charter.

Although Michael Colantuono will be on vacation and miss your July 11th meeting, Michael Cobden will be in attendance and can assist that discussion as you may require. If we can provide further information to assist that discussion, please let us know.